"At common law accusations by information were confined to misdemeanors. 1 Comm., Book IV, p. 310; 31 C.J. 564; United States v. Shepard, supra; Weeks v. United States, supra.

"Now what changes have been produced by the constitution or laws of the United States, affecting the practice in form or substance, so far as regards the question at bar? Congress has passed no law on the subject, and the only constitutional provision affecting the question is the fifth amendment, proposed that same year that the original instrument went into operation—1789.

"Since the authority of the United States Attorney to charge by information is derived from the practice at common law, and since the common law did not recognize such accusation where the offense was above the grade of misdemeanor, it follows that the United States Attorney is without authority to charge by information where the offense amounts to a felony.

"It is therefore my conclusion that, while the provision of the Fifth Amendment requiring an indictment where the offense is capital or otherwise infamous creates a personal privilege which may be waived, it will take enabling legislation by Congress to authorize an accusation to be made in such a case by information filed by the United States Attorney."

Rule 7 did not give the United States Attorney the power to proceed by information. The intent of Rule 7 was stated by Honorable Edward M. Curran before the Institute on the Federal Rules of Criminal Procedure, on October 29, 1945, 5 F.R.D. 184, p. 196, as follows:

"A defendant charged with an infamous crime *other than capital offense*, would be permitted to waive in-

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 90

JOHNNY RAY SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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Montgomery, Alabama

Of Counsel:
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Montgomery, Alabama

dictment by the Grand Jury and to consent to prosecution by information. (Rule 7(b).)" (Italics ours.)

In the rule itself; the very first sentence states an offense which may be punished by death *shall be prosecuted by indictment only.*

II

The Petitioner Was Deprived of Due Process When the Trial Judge, and the F.B.I. Agent, John Lill, One of the Arresting Officers Conferred Privately in Chambers About Petitioner Prior to the Petitioner Entering a Plea.

The Court of Appeals recognized that a basic right had not been accorded this petitioner and that he had been deprived of due process when the trial Judge and F.B.I. Agent, John Lill, conferred privately in chambers prior to the petitioner entering a plea. In *Smith* v. *United States*, 238 Fed. 2d 925, p. 931, the Court says:

> "Finally, a defendant who, having first been presented with waivers to sign and having waived counsel and the benefit of consideration by a Grand Jury, is permitted by the Court to plead guilty instead of standing trial, is entitled to have the Judge before whom he stands approached and act in the case with complete judicial detachment, uninfluenced by conferences in chambers with agents of the prosecution."

The Court stated emphatically that the action of the judge and the agent was wholly impermissible and that this was the determinative issue of the case. If this in chambers conference was in fact a violation of due process, then the District Court's failure to permit a plea of not guilty and to grant a new trial was a denial of the petitioner's constitutional rights.

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BRIEF FOR THE PETITIONER

Opinions Below

This case was appealed to the Court of Appeals for the Fifth Circuit three times: *Smith* v. *United States*, 223 Fed. 2d 750 (R. 41); *Smith* v. *United States*, 238 Fed. 2d 925 (R. 250); rehearing denied 240 Fed. 2d 347 (R. 251); *Smith* v. *United States*, 250 Fed. 2d 842 (R. 266).

The District Court findings were reported only once, the report being in 137 Fed. Supp. 222.

Jurisdiction

The most recent judgment of the United States Court of Appeals was entered November 21, 1957 (R. 271). A petition for a writ of certiorari was filed on December 19, 1957, and was granted on June 9, 1958. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Can jurisdiction of a United States District Court be properly invoked in a capital case which is prosecuted by information filed by the United States Attorney?

2. Is the due process clause of the Fifth Amendment violated when the trial judge, prior to the defendant entering a plea, confers outside the presence of the defendant or his counsel, with the F.B.I. agent who arrested the defendant, about other alleged criminal acts and the facts of the crime of which the defendant is accused?

3. If waivers of indictment, venue and counsel and plea of guilty are taken in violation of due process, is it mandatory that all the waivers and plea be set aside?

Statutes, Constitutional Amendments and Rules Involved

Title 18, Section 1201(a), United States Code Annotated provides:

> "Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof,

shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

Federal Rules of Criminal Procedure, Rule 7, provided:

"(a) Use of Indictment or Information. *An offense which may be punished by death shall be prosecuted by indictment.* An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

"(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment." (Italics ours.)

The Fifth Amendment of the United States Constitution is involved:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Statement

Petitioner was charged by information with the offense of kidnapping. He pleaded guilty (R. 7) and was sentenced to thirty (30) years imprisonment (R. 9).

Petitioner was apprehended on Friday afternoon, November 18, 1949, in Geneva, Alabama, by agents of the Federal Bureau of Investigation. He was incarcerated in Dothan, Alabama, and on Monday morning, November 21, 1949, petitioner was brought to Montgomery, Alabama, where he waived his rights to counsel (R. 4), venue (R. 5) and indictment (R. 1). The same morning and immediately after information was filed, petitioner pleaded guilty and received a thirty (30) year sentence, all before noon. Prior to petitioner signing the waivers or making his plea, F.B.I. Agent Lill, one of the arresting officers, entered the private chambers of the Judge of the District Court and outside of the hearing of the petitioner (petitioner had no counsel), Agent Lill advised the Judge as to his version of the other criminal acts and other criminal charges against petitioner and of the facts leading up to petitioner's arrest (R. 207-209, 224). Almost immediately thereafter, the Judge in open court allowed the petitioner to execute a waiver of indictment and verbally waive counsel and venue and to enter a plea of guilty. He then stated Mr. Lill had gone over this case with him and pronounced sentence (R. 9).

This case has been to the United States Court of Appeals for the Fifth Circuit on three occasions (*supra*):

A. Petitioner asked for and was granted relief by the Court of Appeals, pursuant to authority contained in Title 28, Section 2255, United States Code. A hearing in the District Court was ordered by the Court of Appeals, *Smith v. United States*, 223 Fed. 2d 750 (R. 41).

B. The District Court upon a hearing denied petitioner any relief, *United States* v. *Smith*, 137 Fed. Supp. 222. A second appeal was taken to the Court of Appeals, and at that time, the Court of Appeals held that petitioner's waivers and plea of guilty were taken in violation of due process, *Smith* v. *United States*, 238 Fed. 2d 925. The Court also indicated that the District Judge's in chambers conference with F.B.I. agent, prior to the defendant's entering a plea, was in violation of due process. The United States Attorney asked for a rehearing which was denied, *Smith* v. *United States*, 240 Fed. 2d 347 (R. 251). However, the Court of Appeals on rehearing did amend its mandate to read:

> "The judgment is reversed and the cause is remanded with directions to set aside the conviction and sentence and to proceed further and not inconsistently herewith, including, if the District Judge is of the opinion that the ends of justice require it, permitting the defendant to withdraw his waiver of counsel and his plea of guilty and to stand trial."

C. The case went back to the District Court again, and the District Judge set aside the conviction and sentence first given the appellant on November 21, 1949, but he did not set aside the plea of guilty entered by the appellant on November 21, 1949 (R. 253). As petitioner stood before the Court with his conviction and sentence set aside, his attorney filed a petition for a writ of habeas corpus (R. 254). The Court declined to issue the writ (R. 255). A motion was then made to withdraw the plea of guilty made by the petitioner on November 21, 1949 (R. 255). The Court overruled the motion to withdraw the plea (R. 256). Then a motion was filed for withdrawal of waiver of counsel (R. 256). The Court overruled the motion to with-

draw all of these waivers (R. 257). The District Judge, acting on petitioner's plea of guilty made on November 21, 1949, sentenced the petitioner to serve an additional ten (10) years (R. 260) from the date of such sentence (March 29, 1957) which was in addition to the eight (8) years that petitioner had already served. Petitioner appealed to the Court of Appeals again, *Smith* v. *United States*, 250 Fed. 2d 842. The Court of Appeals refused to grant any further relief (R. 266).

Judge Rives filed a strong dissenting opinion in the second appeal and found that the petitioner was charged with a capital offense and that an indictment was necessary before the District Court had jurisdiction, 238 Fed. 2d 925, p. 931. Judge Rives again dissented from the majority opinion in the last appeal and stated that the District Court's refusal to allow petitioner permission to withdraw his plea of guilty which the majority of the Court had previously held was taken without due process of Law, was beyond his comprehension, 250 Fed. 2d 842, 844 (R. 269).

Summary of Argument

1. The petitioner was charged with a capital offense by an information filed by the United States Attorney. A capital case must be prosecuted by indictment. The petitioner could not waive his right to be indicted in a capital case and even if he could waive indictment, the United States Attorney had no authority by which he could file an information.

2. The petitioner was deprived of due process when the trial judge and the F.B.I. Agent, John Lill, one of the arresting officers, conferred privately in chambers about petitioner prior to the petitioner entering a plea.

3. Petitioner's waivers of indictment, venue and counsel and plea of guilty were all taken at the same time and were all taken in violation of due process. Therefore, it is mandatory that all the waivers and the plea be set aside.

ARGUMENT

I

The Petitioner Was Charged With a Capital Offense by an Information Filed by the United States Attorney. A Capital Case Must Be Prosecuted by Indictment. The Petitioner Could Not Waive His Right to Be Indicted in a Capital Case and Even if He Could Waive Indictment, the United States Attorney Had No Authority by Which He Could File an Information.

This case raises a fundamental and important question as to the rights of an individual arrested for the alleged crime of kidnapping. This case is one of first impression in that this Honorable Court has never interpreted Rule 7 of the Federal Rules of Criminal Procedure as to whether or not a person charged with a capital offense may be prosecuted upon an information.

The pertinent part of the information (R. 2) filed by the United States Attorney in this case is as follows:

> "On or about November 14, 1949, JOHNNY RAY SMITH, RICHARD DALE NUNN, and ROBERT PETER JINKS, did knowingly transport in interstate commerce from Calhoun County in the State of Florida to Coffee County in the Middle District of Alabama, a person, to-wit, Alan W. Spearman, Jr., who had been unlawfully seized, kidnapped, abducted, and carried away and held for the safe conduct of the three defendants from Calhoun County, Florida to Coffee County, Alabama.
>
> /s/ Hartwell Davis
> Assistant United
> States Attorney."

We believe the wording of the information was sufficient to allege an act for which the defendant could have been given the death penalty. In *United States* v. *Parrino*, 180 Fed. 2d 613, p. 615, Judge Learned Hand said as follows:

> "We agree that the indictment stated all the essentials of the crimes charged and that it was not necessary to allege that the victim was not released 'unharmed' in order that the jury might recommend the death-penalty.
>
> ". . . we, too, think that the indictment need not allege whether the victim had been released 'unharmed'."

When this point was raised by your petitioner on the second appeal to the Court of Appeals, the majority opinion of the Court held that the defendant was not charged with a capital offense and held that indictment could be waived, pursuant to the authority of *Barkman* v. *Sanford*, 162 Fed. 2d 592; *Smith* v. *United States*, 238 Fed. 2d 925. The District Court had found that the victim was never harmed, *United States* v. *Smith*, 137 Fed. Supp. 222. Can the Court of Appeals or the District Court examine evidence taken in any proceeding to determine what is charged in an information? We think not; we believe that the allegation of the crime must come from the information alone.

If the defendant could possibly be given the death penalty under the wording of the information, he is then charged with a capital offense. The question then arises as to whether or not the defendant could have been given the death penalty after he pleaded guilty. In *Scudlund* v. *United States*, 97 Fed. 2d 742 (C.A. 7) p. 748, the defendant was indicted for kidnapping, entered a plea of guilty and was sentenced to death upon the recommendation of a jury called by the Court to determine whether defendant should suffer such penalty. The Court of Appeals was quite explicit:

"On a plea of guilty, it is discretionary with the court to punish by imprisonment for such terms of years as the court, in its discretion, shall determine, but before the death penalty may be imposed, that question must be submitted to the jury. As to whether it should be so submitted is a matter entirely in the discretion of the trial court. He may sentence to imprisonment in his discretion, or he may, in his discretion, submit to the jury for its recommendation on the question of the death penalty."

It is obvious that the petitioner could have suffered the same fate. In the dissenting opinion, *Smith* v. *United States*, 238 Fed. 2d 925, p. 933, Judge Rives took cognizance of the *Seadlund* case.

"Even appellant's plea of guilty may not have relieved him of the possibility of suffering death as punishment for the offense. In *Seadlund* v. *United States*, 7 Cir. 97 F.2d 742, 743 it was held permissible for the court, after accepting a plea of guilty, to submit to a jury the question calling for its recommendation as to the death penalty."

The defendant cannot waive his right to be indicted in a capital case, and even if a defendant could waive indictment in a capital case, United States Attorney has no authority by which he can file an information. In the case of *United States* v. *Gill*, 55 Fed. 2d 399, 403, 404, the Court so held and used the following steps to reach its decision:

"Criminal procedure in federal courts, in the absence of statute, is in accordance with the common law. Zolene's 'Federal Criminal Law and Procedure', Vol. 1, § 10; United States v. Maxwell, 3 Dill 275, Fed. Cas. No. 15,750; United States v. Reid, 12 How. 361, 13 L.Ed. 1023; United States v. Baugh (C.C.), 1 F. 784, 788.

III

Petitioner's Waivers of Indictment, Venue and Counsel and Plea of Guilty Were All Taken at the Same Time and Were All Taken in Violation of Due Process, Therefore, It Is Mandatory That All the Waivers and the Plea Be Set Aside.

Lastly, the positions taken by the Court of Appeals in *Smith* v. *United States*, 238 Fed. 2d 925, and in *Smith* v. *United States*, 240 Fed. 2d 347, are completely incongruous. In the body of its opinion, in 238 Fed. 2d 925, p. 930, the Court of Appeals stated:

> "When it comes to the controlling question, however, which the motion presents, whether under the undisputed facts the defendant was denied due process in the taking of waivers and plea, and the imposition of sentence the matter stands quite differently, and because it is clear that it was not accorded to him, the judgment appealed from must be reversed."

Further on in this opinion, on page 930, the Court stated:

> ". . . both what was said and done and what was left unsaid and undone by the Judge in taking the waivers and the plea and sentencing the defendant, we are left in no doubt that the movant was not accorded, but was denied, due process, and that the judgment against and the sentence imposed upon him may not stand."

However, its mandate on rehearing, 240 Fed. 2d 347, reads as follows:

> "The judgment is reversed and the cause is remanded with directions to set aside the conviction and sentence and to proceed further and not inconsistently herewith, including, if the district judge is of the opinion

that the ends of justice require it, permitting the defendant to withdraw his waiver of counsel and his plea of guilty and to stand trial."

When the case came before the District Court again, the District Judge set aside the conviction and sentence but refused to permit the withdrawal of the waivers, and on petitioner's plea of guilty, entered on November 21, 1949, petitioner was sentenced to ten (10) years from November 29, 1957 (R. 260).

The discrepancies were pointed out to the Court of Appeals but the actions of the District Court were upheld in *Smith* v. *United States*, 250 Fed. 2d 842. After the conviction and sentence were set aside, and before a new sentence was pronounced, the petitioner filed for a writ of habeas corpus (R. 254). The Court declined to issue the writ of habeas corpus (R. 255). Petitioner moved to set aside his plea of guilty (R. 255). Motions were also made to withdraw waiver of venue and waiver of indictment and waiver of counsel (R. 256). All were overruled and denied (R. 257).

With the last appeal to the Court of Appeals, petitioner filed an application for a writ of mandamus to compel the District Judge to comply with the mandate. The writ was denied (R. 267).

Appellant's basic constitutional rights have been violated in that the waivers of indictment, venue and counsel and plea of guilty were all taken in violation of due process and all the waivers and the plea should be set aside.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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